

Goody's Family Clothing, Inc. and Amalgamated Clothing & Textile Workers Union (ACTWU), AFL-CIO, CLC, Petitioner. Case 10-RC-14195

August 10, 1992

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered objections to an election held January 9, 1992,¹ and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 75 for and 65 against the Petitioner, with 9 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

On January 16, 1992, the Employer timely filed objections to the election. Pursuant to Section 102.69 of the Board's Rules and Regulations, the Employer had until the close of business on January 23 to furnish its evidence in support of the objections. On January 23, the Employer submitted this evidence to a delivery service for next day delivery. The evidence was received by the Regional Office on January 24.

On February 6, the Regional Director issued his Report on Objections in which he recommended to the Board that the Employer's objections be overruled because the supporting evidence was not timely submitted, as required by the Board's Rules and Regulations.²

In its exceptions, the Employer argues that the Regional Director should have exercised his broad administrative discretion and accepted the Employer's untimely submission of evidence in light of the Employer's "good faith belief that the evidence was due to be submitted on January 24." In counting the days from the filing of the objections on January 16, counsel for the Employer did not include the Martin Luther King, Jr. holiday, which fell on Monday, January 20. The Employer contends that the count was based on a good-faith interpretation of the Board's regulations and

that the receipt of the evidence on January 24 was not an attempt to delay the orderly procedures of the Board and would result in no prejudice. The Employer also claims that it did not learn of the Board's time limitations rule until receiving a letter from the Regional Director on January 29, stating that the due date for evidence in support of its objections was January 23. This letter was mailed from the Regional Office on January 16.

For the reasons stated below, we agree with the Regional Director that the Employer's evidence was untimely filed. Section 102.69(a) of the Board's Rules and Regulations provides that the party filing objections shall furnish supporting evidence "[w]ithin 7 days after the filing of objections." Section 102.111(a) of the Board's Rules and Regulations explains the computation of time as follows:

In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the official closing time of the receiving office on the next Agency business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

Accordingly, when the period of time allowed is 7 days, as here, intermediate Saturdays, Sundays, and holidays are included in the computation. The Employer's asserted belief that the Martin Luther King, Jr. holiday is not included in the time computation is contrary to the clear and unambiguous meaning of the Board's rules.³

Our dissenting colleague would direct the Regional Director to accept the evidence and consider the merits of the objections based on his view that when a holiday occurs during the first 6 days of a 7-day filing period, parties should be allowed an extra day, as they are when the holiday falls on the seventh day. He notes that the Employer would have had at most 4 full days to prepare its submission, a result that he finds to be contrary to the Board's intent when it revised the time limits in 1986 to lengthen the period for filing in representation cases.

The Board has previously considered and rejected the approach advocated by the dissent. In *Drum Li-*

¹ All dates are in 1992 unless otherwise indicated.

² Sec. 102.111(b) states that "the Board will accept as timely filed any document which is hand delivered to the Board on or before . . . the due date or postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely. 'Postmarking' shall include timely depositing the document with a delivery service." Here, the Employer's evidence was received 1 day late. Further, the submission was not timely under the "postmark" rule because the documents in question were not "postmarked" until the due date.

³ We also reject the Employer's contention that its failure to receive the Regional Director's January 16 letter until after the due date excuses it from its obligation to comply with Sec. 102.69(a) of the Board's Rules and Regulations. The Board has held that the absence of a "reminder letter" from the Regional Office does not relieve the objecting party of its obligation to timely file the evidence in support of its objections. *Public Storage*, 295 NLRB 1034 (1989).

thographers, 287 NLRB 22 (1987), the full Board, over the dissent of Member Cracraft, declined to extend the due date by 1 day when a holiday fell during the first 6 days of the 7-day period for filing objections. The Board recognized that the available number of working days in the filing period was reduced, but stated that “we do not believe that such a relatively unusual circumstance overrides the desirability of simplicity, clarity, and uniformity in formulating procedural rules.” *Id.* at fn. 7.

With respect to *John I. Haas, Inc.*, 301 NLRB 300 (1991), cited by our dissenting colleague, we note that it overruled *Drum* only insofar as *Drum* refused to apply the “postmark” rule to the filing of objections. *Haas* did not disturb the separate holding of *Drum* that the Board will not carve out an exception to its rules in instances when a holiday falls during the first 6 days of a 7-day filing period. Indeed, *Haas* did not even discuss the effect of an intervening holiday because the facts of that case did not present the issue. Subsequent to the issuance of *Haas*, a Board majority again rejected the argument that a 7-day filing period should be extended to allow for an intervening holiday. *Medi-Center of America HBA Corp.*, 301 NLRB 680 (1991). Accordingly, it is clear that *Drum*’s holding on the holiday issue remains good law, and we reaffirm it today.

Because the Employer’s evidence was not submitted to the delivery service until the due date and was not received by the Regional Office until the day after the due date, we find that the evidence was untimely filed. Accordingly, we adopt the Regional Director’s recommendation to overrule the Employer’s objections and issue a certification of representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Amalgamated Clothing & Textile Workers Union (ACTWU), AFL–CIO, CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time hourly paid employees employed by the Employer at its Knoxville, Tennessee distribution center, but excluding all office clerical employees, store maintenance employees, store operation employees, truck drivers, guards, managers and all other supervisors as defined in the Act.

MEMBER DEVANEY, dissenting.

I disagree with my colleagues’ decision to adopt the Regional Director’s recommendation that the Employer’s timely objections be overruled because the Employer’s attorney submitted the supporting evidence to the Region 1 day after the due date. Rather, I would direct the Regional Director to accept the evidence and

to consider the merits of the objections. In my view, when a holiday occurs during the first 6 days of a 7-day filing period, parties should be accorded the full time period, as they are when the holiday falls on the seventh day. The facts of this case illustrate the desirability of this type of approach rather than the current rule.

On January 24, 1992,¹ the Regional Office received evidence from the Employer in support of its timely objections, filed on January 16, to a January 9 election. The Employer had delivered the evidence on January 23 to a courier service with guaranteed next day delivery. On January 29, the Employer received a letter from the Regional Office, postmarked January 16, stating that the deadline for submission of evidence was January 23. On February 6, the Regional Director issued his Report on Objections in which he recommended overruling the Employer’s objections in the absence of timely submitted evidence by the Employer. The Employer’s attorney stated in a sworn affidavit that she had dispatched the evidence on January 23 in a good-faith belief that the submission was timely under Section 102.69(a) of the Board’s Rules and Regulations, as she had not counted the January 20 Martin Luther King, Jr. holiday, on which the Board’s offices are closed, as one of the days in the 7-day period the rule prescribes. Nothing in the submissions before us supports an inference that the 1-day delay prejudiced any party’s interest.

To meet the deadline under the majority’s reading of Section 102.69, the Employer would have had to mail its evidence on January 22, or, at the latest, submit the evidence to a courier on January 23 for same day delivery to the Regional Office. Thus, the Employer, if it had used the mails, would have had only 3 full working days after the objections were due (Thursday, January 16, Friday, January 17, and Tuesday, January 21), to prepare its submission and, at most, 4 full days by using a courier. Such a result contradicts the intent of the Board’s 1986 revision of certain time limits in the Rules, which was, in part, to lengthen the period for filing in representation and other types of cases.² The circumstance presented here, i.e., the occurrence of a holiday on one of the first 6 days of the filing period, is the only one where the revision of Section 102.69 actually shortened the filing period from 5 working days under the pre-1986 rule to, in effect, 3 working days.

I recognize that the Board’s Rules are designed to encourage orderly procedures, however, the Board also

¹ Unless otherwise noted, all subsequent dates shall be in 1992.

² “[V]irtually all the periods for filing papers with the Board have been expanded to provide for additional time for filing” Board’s summary of rules changes, 51 Fed.Reg. 23744 (1986), quoted in *Drum Lithographers*, 287 NLRB 22, 23–24 (former Member Cracraft, diss.) (1987), overruled on other grounds, *John I. Haas, Inc.*, 301 NLRB 300 (1991).

has a strong interest in facilitating access to its processes and consideration of cases on their merits. In *John I. Haas*, supra, the Board overruled *Drum Lithographers*, supra, and returned to a “one day prior postmark rule” under which submissions postmarked the day before the due date are considered timely. In so doing, the Board tacitly acknowledged that the *Drum Lithographers* rule³ reduced the number of working days for the preparation of submissions to the Board.⁴ In my view, this same realistic acknowledgement

³Under *Drum Lithographers*, the Board rejected as untimely submissions not actually received in the Board’s office by the due date.

⁴301 NLRB 300, supra at fn. 5.

should be made here, where the vagaries of the calendar have the effect of reducing the amount of time for filing as the vagaries of the mails did in *Haas*, supra. Additionally, in my view, the Board’s rules and interpretations of them should not unnecessarily deny access to the Board’s processes to parties, such as the Employer here, acting in good faith and diligence, and where, as here, no prejudice to the opposing party or to the Board’s processes has been shown.

Accordingly, contrary to my colleagues, I would remand this proceeding to the Regional Director for consideration of the Employer’s evidence in support of its objections and a determination of the objections on their merits.